(1) 88-276

Docket No.

IN THE SUPREME COURT OF THE
UNITED STATES

STATE OF NEW JERSEY, October Term 1988

Plaintiff-Respondent,

vs.

WALTER R. GRIFFIN,

Defendant-Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF NEW JERSEY

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On the Brief:

David A. Gies

QUESTION PRESENTED

I. Whether the offense of driving while intoxicated under New Jersey law is a "serious crime" to which the Sixth Amendment right to trial by jury applies?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

REPORTS OF OPINIONS

State of New Jersey vs. Walter R. Griffin, Docket No. C-1102, September Term 1987, Supreme Court of New Jersey, June 7, 1988.

State of New Jersey vs. Walter R. Griffin, Docket No. A-6162-86T8, Superior Court of New Jersey, Appellate Division, April 8, 1988 - unpublished opinion.

State of New Jersey vs. Walter R. Griffin, Docket No. 8743, Appeal No. 61-87, Superior Court of New Jersey, Law Division, July 31, 1987.

State of New Jersey vs. Walter R. Griffin, Docket No. N610401, Municipal Court of the Township of Lawrence, County of Mercer and State of New Jersey, May 12, 1987.

STATEMENT OF JURISDICTION

On June 7, 1988, the New Jersey Supreme Court ntered an Order denying the defendant-petitioner's etition for Certification and dismissing the efendant-petitioner's appeal. (A-1). This onstituted final action by the State of New Jersey n the appellate procedure.

The controversy herein involves the onstitutionality of N.J.S.A. 2A:8-21(a) as it pplies to N.J.S.A. 39:4-50, (New Jersey's drunk riving statute), and the defendant-petitioner's onstitutional right to trial by jury. The decisions endered by the lower New Jersey courts are based pon their respective interpretations of the pplicable federal constitutional law.

Consequently, the Supreme Court of the United tates has the authority to exercise jurisdiction ver this matter pursuant to 28 U.S.C. §1257(3).

TEXT OF AUTHORITIES

N.J.S.A. 2A:8-21(a):

JURISDICTION OF SPECIFIED OFFENSES

Each municipal court, and the judge or judges thereof, shall have jurisdiction of the following offenses occurring within the territorial jurisdiction of the court:

a. Violations of the motor vehicle and traffic laws;

N.J.S.A. 17:29A-35(b):

MERIT RATING ACCIDENT SURCHARGE FOR PRIVATE PASSENGER AUTOMOBILES: PLANS; SUSPENSION OF LICENSE; DISPOSITION OF FUNDS; AMOUNT OF SURCHARGE; RULES AND REGULATIONS

b. There is created a New Jersey Merit Rating Plan which shall apply to all drivers and shall include, but not be limited to the following provisions:

(1)(a) Plan surcharges shall be levied, beginning on or after January 1, 1984, by the Division of Motor Vehicles on any driver who has accumulated, within the immediately preceding three year period, beginning on or after January 1, 1983, six or more motor vehicle points as provided in Title 39 of the Revised Statutes, exclusive of any points for convictions for which surcharges are levied under paragraph (2) of

this subsection; except that the allowance for a reduction of points in Title 39 of the Revised Statutes shall not apply for the purpose of determining surcharges under this paragraph. Surcharges shall be levied for each year in which the driver possesses six or more points. Surcharges assessed pursuant to this paragraph shall be not less than $100.00 for six points, and not less than $25.00 for each additional point. The commissioner may increase the amount of surcharges as he deems necessary to effectuate the purposes of subsection d. of this section and P.L.1983, c. 65 (C. 17:29A-33 et al.), and may, pursuant to regulation, permit the deferral of all or part of any surcharges authorized by this subsection until the end of the policy term of an automobile insurance policy with an effective date prior to January 1, 1984, upon presentation of appropriate evidence that an insured has already paid an equivalent surcharge arising from the same motor vehicle violations or convictions.

(b) (Deleted by amendment P.L.1984, c. 1.)

(2) Plan surcharges shall be levied for convictions under R.S. 39:4-50 or section 2 of P.L.1981, c. 512 (C. 39:4-50.4a), or for offenses of a substantially similar nature committed in other jurisdictions, for violations occurring on or after January 1, 1983. Surcharges under this paragraph shall be levied annually for a three year period, and shall be not less than $1,000.00 per year

for each of the first two convictions, and not less than $1,500.00 per year for the third conviction occurring within a three year period. If a driver is convicted under both R.S. 39:4-50 and section 2 of P.L.1981, c. 512 (C. 39:4-50.4a) for offenses arising out of the same incident, the driver shall be assessed only one surcharge for the two offenses. The commissioner may increase the amount of surcharges as he deems necessary to effectuate the purposes of subsection d. of this section and P.L.1983, c. 65 (C. 17:29A-33 et al.), and may, pursuant to regulation, permit the deferral of all or any part of these surcharges as provided in paragraph (1)(a) of this subsection.

N.J.S.A. 39:4-50(a):

OPERATING OR ALLOWING OPERATION BY PERSON UNDER INFLUENCE OF LIQUOR OR DRUGS; PENALTIES; ALCOHOL EDUCATION OR REHABILITATION; COLLECTION OF DRIVER'S LICENSE; RIGHTS OF DISCOVERY; INTOXICATED DRIVER RESOURCE CENTERS

(a) A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a

motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood, shall be subject:

(1) For the first offense, to a fine of not less than $250.00 nor more than $400.00 and a period of detainment of not less than 12 hours nor more than 48 hours spent during two consecutive days of not less than six hours each day and served as prescribed by the program requirements of the Intoxicated Driver Resource Centers established under subsection (f) of this section and, in the discretion of the court, a term of imprisonment of not more than 30 days and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State of a period of not less than six months nor more than one year.

(2) For a second violation, a person shall be subject to a fine of not less than $500.00 nor more than $1,000.00, and shall be ordered by the court to perform community service for a period of 30 days, which shall be of such form and on such terms as the court shall deem appropriate under the circumstances, and shall be sentenced to imprisonment for a term of not less than 48 consecutive hours, which shall not be suspended or served on probation, nor more than 90 days, and shall forfeit his right to operate a motor vehicle over the highways of this State for a period of two years upon conviction,

and, after the expiration of said period, he may make application to the Director of the Division of Motor Vehicles for a license to operate a motor vehicle, which application may be granted at the discretion of the director, consistent with subsection (b) of this section.

(3) For a third or subsequent violation, a person shall be subject to a fine of $1,000.00, and shall be sentenced to imprisonment for a term of not less than 180 days, except that the court may lower such term for each day, not exceeding 90 days, served performing community service in such form and on such terms as the court shall deem appropriate under the circumstances and shall thereafter forfeit his right to operate a motor vehicle over the highways of this State for 10 years.

STATEMENT OF THE CASE

Walter R. Griffin is a life-long resident of Mercer County, New Jersey and is currently employed by Princeton University in its food service department.

On November 24, 1986, Mr. Griffin was charged with driving while intoxicated in violation of N.J.S.A. 39:4-50 by the New Jersey State Police when he was driving through Lawrence Township, Mercer County, New Jersey.

Mr. Griffin was convicted of violating the same statute on one previous occasion.

Mr. Griffin challenged the constitutionality of N.J.S.A. 2A:8-21(a) as it applied to N.J.S.A. 39:4-50(a)(2) at all stages of these proceedings in New Jersey. Mr. Griffin asserted that he was constitutionally entitled to a trial by jury because the offense of drunk driving is a serious offense in the State of New Jersey, but that pursuant to N.J.S.A. 2A:8-21(a), the Municipal Courts of this State are not authorized to decide motor vehicle matters with a jury trial afforded the individual

so charged. The Municipal Court denied Mr. Griffin's motion and found that he was not constitutionally entitled to a trial by jury. (A-4). Thereafter, the Municipal Court found Mr. Griffin guilty and sentenced him to a term of imprisonment for 90 days, which was suspended, except for 2 days to be served at the Intoxicated Driver's Resource Center, to pay a fine of $500.00, together with costs of $15.00 and a $100.00 insurance surcharge and to a loss of driving privileges in New Jersey for 2 years. As a result, Mr. Griffin is also subject to a surcharge imposed by the Division of Motor Vehicles in the amount of $1,000.00 per year for 3 years. N.J.S.A. 17:29A-35.

On July 3, 1987, a trial de novo was held in the Superior Court of New Jersey, Mercer County, Law Division. Again on motion, Mr. Griffin challenged the constitutionality of N.J.S.A. 2A:8-21 as it applied to N.J.S.A. 39:4-50, and the Law Division denied his motion. (A-3). Moreover, the Law Division sentenced Mr. Griffin in accordance with the trial court's Order.

On April 8, 1988, the New Jersey Superior Court, Appellate Division, in a per curiam opinion, affirmed the denial of Mr. Griffin's motion for a jury trial citing State v. Linnehan, 197 N.J. Super. 41 (App. Div. 1984), as controlling. (A-2).

Finally, on June 7, 1988, the New Jersey Supreme Court denied Mr. Griffin's Petition for Certification and dismissed his appeal. (A-1).

ARGUMENT

INDIVIDUALS CHARGED WITH VIOLATING N.J.S.A. 39:4-50 ARE CONSTITUTIONALLY ENTITLED TO TRIAL BY JURY BECAUSE THE OFFENSE OF DRIVING WHILE INTOXICATED IS A SERIOUS CRIME IN THE STATE OF NEW JERSEY.

The legal background to the present action is the protection provided by the Sixth Amendment of the Constitution of the United States. That Amendment provides in pertinent part, that "in all criminal prosecutions, the accused shall enjoy the right to a . . . trial by an impartial jury . . .". The full scope of that protection has been afforded to the defendants in state court prosecutions pursuant to the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 20 L. Ed. 2d 491, 28 S. Ct. 144 (1968). In Duncan, the Court held that:

> Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of trial by jury in all criminal cases where-were they to be tried in a federal court-could come within the Sixth Amendment's guarantee.

Duncan v. Louisiana, 391 U.S. at 149; see also Bartaglia v. Union County Welfare Board, 88 N.J. 48, 60 (1981). Consequently, the Supreme Court of the United States has held that persons charged with a "serious" offense are constitutionally entitled to a jury trial and that persons charged with a "petty" offense are not. Baldwin v. New York, 399 U.S. 66, 26 L. Ed. 2d 437, 90 S. Ct. 1886 (1968); see Duncan v. Louisiana, supra; see also State v. Owens, 54 N.J. 153 (1969).

In order to determine the seriousness of an offense, the United States Supreme Court has examined "objective criteria, chiefly the existing laws and practices in the Nation." Duncan v. Louisiana, 391 U.S. at 161, 20 L. Ed. 2d at 503. A particularly relevant indication of the seriousness of the offense is the authorized maximum penalty that could be imposed. If the authorized sentence of incarceration exceeds six months and the permitted fines exceed $500.00, the offense is "serious" for jury trial purposes. Baldwin v. New York, supra.

While the penalty authorized for a particular crime may be utilized as a valuable tool in determining whether an offense is serious or not, the United States Supreme Court has stated that:

> [d]ecisions of this Court have looked to both the nature of the offense itself, District of Columbia v. Colts, 282 U.S. 63, 51 S. Ct. 52, 75 L. Ed. 177 (1930), as well as the maximum potential sentence, Duncan vs. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), in determining whether a particular offense was so serious as to require a jury trial.

Id. at 69 n. 6. Moreover, it opined that:

> [i]ndeed we long ago declared that the Sixth Amendment right to jury trial 'is not to be construed as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen.' Callan v. Wilson, 127 U.S. 540, 549, 32 L. Ed. 223, 226, 8 S. Ct. 1301 (1888).
>
> A better guide '[i]n determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial' is disclosed by 'the existing laws and practices in the Nation.' Duncan v. Louisiana, supra, at 161, 20 L. Ed. 2d at 503.

Id. at 70. Therefore, other consequences, collateral in nature, cannot escape judicial examination and may, in themselves, be enough to require a jury trial. Id.; Muniz v. Hoffman, 422 U.S. 454, 476, 45 L. Ed. 2d 319, 95 S. Ct. 2178 (1974); see also Welsh v. Wisconsin, 466 U.S. 740, 761-763, 80 L. Ed. 2d 732, 104 S. Ct. 2091 (1984) (see particularly White, J., dissenting).

Consequently, a strict adherence to the Baldwin "bright-line" test should not control the disposition of the question presented and it is the character of the offense itself that is determinative.

Several lower federal courts have considered collateral factors in prosecutions for driving while intoxicated. United States v. Craner, 652 F. 2d 23, 24-27 (9th Cir. 1981); Bronson v. Swinney, 648 F. Supp. 1094 (D. Nev. 1986); United States v. Woods, 450 F. Supp. 1335 (D. Md. 1978); Brady v. Blair, 427 F. Supp. 5 (S.D. Ohio 1976).

In United States v. Craner, the defendant therein, charged with driving while intoxicated

in Yosemite National Park, faced a maximum penalty of six months imprisonment and/or a $500.00 fine, plus costs. United States v. Craner, 652 F. 2d at 24. Because the penalty does not exceed a period of six months imprisonment or a $500.00 fine, it falls below the Baldwin "bright-line" test. However, the Ninth Circuit Court of Appeals held that the offense with which the defendant was charged is a "serious" one for which the Federal Constitution guarantees a trial by jury. Id. In determining that the offense of driving while intoxicated was serious, the Ninth Circuit stated that:

> The extent of possible punishment does not, however, alone determine whether an offense is serious or petty. Although Congress has established the sanctions of six months' imprisonment or $500 in fines as the bright line between serious and petty offenses, see 18 U.S.C. § 1(3), the Supreme Court has not found 'talismanic significance' in this formula when determining whether a constitutional right to a jury trial exists. Muniz, supra, 422 U.S. at 477, 95 S.Ct. at 2190. Inquiry into the seriousness of an offense does not end where Title 18 begins. Otherwise, the constitutional right to a jury trial would exist only

> at the sufferance of the legislative branch.

Id. at 25.

In United States v. Woods, the defendant therein was charged with driving while intoxicated on national park land and as the defendant in Craner, was faced with a penalty of six months imprisonment and/or a $500.00 fine, plus costs. United States v. Woods, 450 F. Supp. at 1336. Holding that the defendant was constitutionally entitled to a trial by jury under the Federal Constitution, the District Court for the District of Maryland opined that:

> Beyond the prescribed punishment, the Court may properly examine, with regard to the offense of driving while intoxicated, 'the laws and practices of the community taken as a guage of its social and ethical judgments.' (Citations omitted).

Id. at 1345. In this regard, the court examined several factors to determine the seriousness with which the State of Maryland accords offenders of this type, including the term of imprisonment, the fine imposed and collateral consequences such

as the revocation of an individual's driving license, id. at 1346, and determined that driving while intoxicated is a "serious" offense in the State of Maryland. Id. at 1348.

In Bronson v. Swinney, the defendant was charged with driving while intoxicated under Nevada state law and as a first time offender, he was faced with a possible penalty of imprisonment for not less than two days nor more than six months and a fine of not less than $200.00 nor more than $1,000.00. Bronson v. Swinney, 648 F. Supp. at 1096. Moreover, he was faced with several collateral consequences such as loss of driver's license upon conviction and enhancement of penalties if subsequently convicted of the same offense. Id. at 1099. The District Court for the District of Nevada, after a discussion of the applicable federal case law, recognized that:

> [i]n the case at bar, the nature of the offense, the collateral consequences of a conviction for the offense, and the fact that the penalty for the offense includes mandatory imprisonment are factors

> that reflect the seriousness with which society regards the offense of driving while intoxicated. These are factors that cannot be ignored in deciding whether the petitioner has a constitutional right to a jury trial.

Id. at 1098-99. Concluding, the court held that the defendant was constitutionally entitled to a jury trial under the Federal Constitution. Id. at 1101.

In Brady v. Blair, the District Court for the Southern District of Ohio held that a defendant is constitutionally entitled to a trial by jury because the offense of driving while intoxicated is serious where the maximum penalty under state law had carried a fine of $500.00, a term of imprisonment of six months and a mandatory three day sentence. Brady v. Blair, 427 F. Supp. at 10.

Interestingly, in United States v. Jenkins, the Fourth Circuit Court of Appeals found that under South Carolina law, the defendant therein was not constitutionally entitled to a jury trial

because the offense of drunk driving was not serious; however, though holding that the maximum penalty was not serious enough to warrant a jury trial as guaranteed by the Federal Constitution, the court did correctly analyze the collateral consequenses. United States v. Jenkins, 780 F. 2d 472 (4th Cir. 1986). Those collateral consequences that were not sufficient to classify the offense as "serious" included:

> [a] $25.00 mandatory assessment upon conviction; probation and community service work in lieu of incarceration; attendance at an alcohol and treatment program costing as much as $200.00; automatic suspension of South Carolina Driver's License for six months; a six month automatic suspension of driving privileges in South Carolina for out-of-state drivers and possible suspension of driver's license by offender's home state; and possible increased insurance rates.

Id. at 474.

Other federal courts have declined to award jury trials in drunk driving matters and have held that the court need not examine the collateral consequences in such instances. Landry v. Hoepfner,

818 F. 2d 1169 (5th Cir. 1987), reversed _____ F. 2d _____ (5th Cir. 1988) (en banc); United States v. Fletcher, 505 F. Supp. 1053 (W.D. Va. 1981); Matos v. Rodriguez, 440 F. Supp. 673 (D. Puerto Rico 1976).

Thus, it is noteworthy that on June 20, 1988 the United States Supreme Court granted certiorari in Blanton v. North Las Vegas Municipal Court, Docket No. 87-1437, on the question of whether a misdeameanor offense of driving under the influence of an intoxicating liquor under Nevada State law is a "serious" crime to which attaches the right to a jury trial.

Particular to this case, Mr. Griffin was sentenced as a second offender and is liable to pay a fine of up to $1,000.00, to serve a term of imprisonment of up to 90 days, to forfeit his driving privileges in this State for 2 years and to perform community service for a period of 30 days. N.J.S.A. 39:4-50(a)(2). Moreover, he is liable to serve a period of detainment at an

Intoxicated Driver Resource Center. In addition, he is required to pay $100.00 to the Division of Motor Vehicles and at least $3,000.00 to the New Merit Rating Plan within a three (3) year period. N.J.S.A. 17:29A-35(b)(1) and (2).

Also, New Jersey's drunk driving statute provides that the penalties shall increase for second and for third and subsequent offenders. N.J.S.A. 39:4-50(a)(2) and (3). A third and subsequent offender is liable to pay a fine of up to $1,000.00, to serve a term of imprisonment for not less than 180 days and to forfeit his driving privileges on the New Jersey highways for ten years. N.J.S.A. 39:4-50(a)(3).

By comparison, the penalties imposed on those individuals convicted of drunken driving in New Jersey are at least identical, if not more severe, than the penalties imposed by the courts in the cases discussed above. Also, the collateral consequences such as the loss of driving privileges, the insurance surcharges and the enhanced penalties

with each subsequent conviction of N.J.S.A. 39:4-50 are factors that reflect the seriousness with which the State of New Jersey views the offense of driving while intoxicated. New Jersey courts, however, have not found it desirable to award a jury trial to defendants charged with violating N.J.S.A. 39:4-50, and have refused to properly analyze the factors relevant to the determination of whether the offense is serious as opposed to petty. In essence, they regard the severity of the authorized punishment as the only reliable factor in distinguishing between a serious offense and a petty offense. State v. Linnehan, 197 N.J. Super. 41 (App. Div. 1984). Prior decisions in New Jersey have held that it is, in fact, the term of the imprisonment and not the fine imposed, or for that matter, any other form of penalty, that is the key to the jury trial analysis. State v. Zoppi, 196 N.J. Super. 596 (Law Div. 1984); see also State v. Tenriero, 183 N.J. Super. 519 (Law Div. 1981).

Further, of the state courts that have addressed

this issue, only the courts in New Jersey, New Mexico and Nevada appear to deny the right to a jury trial to all defendants. State v. Linnehan, supra; State v. Smith, 99 Nev. 806, 672 P. 2d 631 (1983); Hamilton v. Walker, 65 N.M. 470, 340 P. 2d 407 (1959); see also (A-5).

Finally, the New Jersey Supreme Court itself has observed that drunk driving is an offense which imposes an "extremely grave menace to the public safety and welfare". State v. Macuk, 57 N.J. 1, 9 (1970). More recently, the Court has opined that:

> The overall scheme of New Jersey's drunk driving laws reflects the dominant legislative purpose to eliminate intoxicated drivers from the roadway of this State. To this end, the Legislature, working in tandem with the courts, has consistently sought to streamline the implementation of these laws and to remove the obstacles impeding efficient and successful prosecution of those who drink and drive.

State v. Tischio, 107 N.J. 504, 514 (1987).

Such a public policy pronounced by the highest

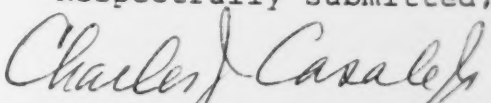
court in the State of New Jersey acknowledges that removing the drunk driver from our highways is an important law enforcement objective. Consequently, while arguing against an individual's Sixth Amendment right to a jury trial in matters such as the one before this Court, the State of New Jersey has cast itself into the uncomfortable position of downplaying the seriousness with which our society and our legislature regard the offense of drunk driving. More importantly, though, streamlining the implementation of the drunk driving laws and removing the obstacles impeding efficient and successful prosecution, cannot be accomplished at the expense of an individual's constitutional right to trial by jury. Thus, it is clear that the so-called "bright-line" test is not the sole standard to determine the constitutional requirements for a jury trial. It is further clear that the collateral consequences attendant to the second grade of the offense of drunk driving in New Jersey make a jury trial applicable to this case.

Therefore, the defendant in this case is constitutionally entitled to a trial by jury because the offense of driving while intoxicated is a serious crime in the State of New Jersey.

CONCLUSION

Wherefore, the defendant-petitioner prays, for the reasons set forth herein, that this Court grant Certiorari.

Respectfully submitted,



CHARLES J. CASALE, JR.
Attorney for Defendant-Petitioner

Dated: August 4, 1988

CERTIFICATE OF SERVICE

I, Charles J. Casale, Jr., hereby certify that pursuant to Rule 28.5(b), on August 4, 1988 I served three (3) copies of the Petition for Writ of Certiorari on the Attorney General of the State of New Jersey at his principle place of business at the Richard J. Hughes Justice Complex in Trenton, New Jersey by regular mail.

Dated: August 4, 1988

Charles J. Casale Jr

CHARLES J. CASALE, JR.

APPENDIX

SUPREME COURT OF NEW JERSEY
C-1102 September Term 1987

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

WALTER R. GRIFFIN,

Defendant-Petitioner.

28,773

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-6162-86T8 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs; and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to Rule 2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 7th day of June, 1988.

S/Stephen W. Townsend
CLERK OF THE SUPREME COURT

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-6162-86T8

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WALTER R. GRIFFIN,

Defendant-Appellant.

Argued March 29, 1988 -- Decided April 8, 1988

Before Judges Michels and A.M. Stein.

On appeal from the Superior Court of
New Jersey, Law Division, Mercer County

Charles J. Casale, Jr. argued the cause for
appellant (Mr. Casale, attorney;
David A. Gies, of counsel and on the brief).

Ellen Ann Fraulino, Assistant Mercer County
Prosecutor, argued the cause for respondent
(Paul T. Koenig, Jr., Mercer County
Prosecutor, attorney; Ms. Fraulino, of
counsel and on the letter brief).

PER CURIAM.

Defendant Walter R. Griffin was charged with operating a vehicle while under the influence of intoxicating liquor in violation of N.J.S.A. 39:4-50.

Thereupon defendant and several others similarly charged instituted an action in the United States District Court for the District of New Jersey, challenging the constitutionality of N.J.S.A. 2A:8-21a as it applied to deny them jury trials on charges of driving while intoxicated in violation of N.J.S.A. 39:4-50. The District Court dismissed the complaint on the ground that Federal courts must abstain from hearing a pending state criminal proceeding. Defendant and the others then instituted an action in the Chancery Division, seeking a trial by jury in all such cases. The Chancery Division dismissed this complaint on the ground that the proper procedure would be for the parties to first have their respective cases tried in municipal court.

Thereafter, defendant was tried and found guilty of driving while intoxicated in the Lawrence Township Municipal Court. Defendant, who was a second offender (N.J.S.A. 39:4-50a(2)), was sentenced to a term of imprisonment of 90 days which was suspended on the condition that defendant serve

two days in the Intoxicated Driver Resource Center and 30 days of community service. In addition, defendant was fined $500, surcharged $100, and his driving privileges were revoked for two years. The municipal court denied defendant's motion challenging the constitutionality of N.J.S.A. 20:8-21a as applied to N.J.S.A. 39:4-50 and held that defendant was not entitled to a trial by jury.

Defendant appealed to the Law Division where, following a trial de novo on the record, the trial court rejected his constitutional challenge to trial without a jury and found him guilty of operating his motor vehicle while under the influence of intoxicating liquor. The trial court imposed the same sentence as that imposed by the municipal court. Defendant appealed and his applications to the trial court, the Appellate Division, the New Jersey Supreme Court and the United States Supreme Court for a stay of his sentence pending appeal were denied.

Defendant seeks a reversal of his conviction or, alternatively, a reversal and remand for a

trial by jury, contending solely that he was constitutionally entitled to a jury trial because the offense of driving while intoxicated in violation of N.J.S.A. 39:4-50 is a serious crime in New Jersey. We have carefully considered the contention and all of the arguments advanced by defendant in support of it and find that it is clearly without merit. R. 2:11-3(e)(2). We affirm the denial of defendant's motion for a jury trial substantially for the reasons expressed by Judge DeMartin in his oral opinion of July 31, 1987. The trial court's decision is consistent with and controlled by State v. Linnehan, 197 N.J. Super. 41 (App. Div. 1984), certif. den. 99 N.J. 236 (1985). In Linnehan, we held specifically that a defendant charged as a third offender with driving while intoxicated in violation of N.J.S.A. 39:4-50 was not entitled to a jury trial, stating:

> Persons charged with crime are constitutionally entitled to trial by jury. Those charged with petty offenses are not. Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). The New Jersey Supreme Court has held that the only reliable

test for distinction is the severity of the authorized punishment, and that jury trial is not required unless the maximum penalty to which the defendant is exposed exceeds six months incarceration and a fine of $1,000. State v. Owens, 54 N.J. 153 (1969); In re Yengo, 84 N.J. 111 (1980). See Baldwin v. New York, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970). Where factually related petty offenses are tried together whose maximum sentences total more than six months, and the defendant is not offered a jury trial, the sentences may not total more than six months. State v. Owens, supra. Concurrent jail sentences, each of which does not exceed six months, are permissible. Id. 54 N.J. at 163.

The penalty for a drunk driving third offender is a mandatory term of incarceration for 180 days, a fine of $1,000 and loss of license for 10 years. N.J.S.A. 39:4-50. The statutory language, "a term of not less than 180 days, "was not well chosen. However, we are satisfied of the legislative intent and we adopt the reasoning of State v. Ferretti, 189 N.J. Super. 578 (Law Div. 1983) in this regard. Defendant was ordered to be jailed for a total of 200 days less 90 days of community service, or a net 110 days. Since his total sentence exposure was to incarceration of not more than six months and a fine of $1,000, and his actual incarceration will be less, there is no constitutional infirmity. [197 N.J. Super. at 43].

See also State v. Owens, 54 N.J. 153 (1969), cert.

den. 396 U.S. 1021, 90 S. Ct. 593, 24 L. Ed. 2d 514 (1970).

Accordingly, the judgment under review is affirmed.

I hereby certify that the foregoing is a true copy of the original on files in my office.

S/ Jack G. Trubenbach
CLERK OF THE APPELLATE DIVISION

LAW DIVISION
QUASI-CRIMINAL

DOCKET NO. 8743
APPEAL NO. 61-87

THE STATE OF NEW JERSEY

VS.

WALTER R. GRIFFIN

Defendant.

JUDGMENT

VIOLATION Driving While Under the Influence of Alcohol 39:4-50 Summons No. N610401

MUNICIPALITY Lawrence Township

APPEAL FILED May 22, 1987

TRIAL DE NOVO on transcript, July 31, 1987

DISPOSITION Defendant having been found guilty to Driving While Under the Influence of Alcohol.

Motion by Defense for a Jury Trial- Denied by Court.

Sentence

90 days incarceration (suspended all but two days to be served at the Intoxicated Driver's Resource Center)

2 years revocation of Driver's License;

$500.00 Fine;

$15.00 Court Costs;

$100.00 Surcharge;

30 days Community Service (to be assigned by Municipal Court Authorities).

Motion by Defense for a stay pending appeal- Denied by Court.

However, imposition of sentence is stayed for one week, at which time defendant is to surrender driver's license to Municipal Court by 12 NOON.

Entered in docket of MERCER COUNTY CLERK'S OFFICE on Friday August 7, 1987 and make arrangements for payment of fine, unless otherwise Ordered Pursuant to R.3:31-5 & R.3:23-8(e) by Appellate Court.

S/ THOMAS DeMARTIN, J.S.C.

S/ ALBERT E. DRIVER, JR.
County Clerk

Dated: July 31, 1987

CHARLES J. CASALE, JR., P.A.
311 Whitehorse Avenue
Trenton, New Jersey 08610
(609) 585-7711
Attorney for Defendant-Appellant

MUNICIPAL COURT OF THE
TOWNSHIP OF LAWRENCE
COUNTY OF MERCER
STATE OF NEW JERSEY

DOCKET NO. N610401

STATE OF NEW JERSEY, Plaintiff-Respondent vs. WALTER R. GRIFFIN, Defendant-Appellant	ORDER

This matter having been brought before the Court by Charles J. Casale, Jr., Esq., attorney for Defendant, in the presence of Andrew J. Smithson, Esq., Prosecutor, Lawrence Township, and it appearing that Defendant has filed a timely appeal with the

Superior Court of New Jersey, Mercer County, from his conviction of N.J.S.A. 39:4-50 in the Lawrence Township Municipal Court, and that he was sentenced to a pay a fine of $500.00, together with costs of $15.00, $100.00 surcharge, revocation of his New Jersey driver's license for two (2) years, thirty (30) days of community service, and a term of imprisonment for ninety (90) days, of which said term is suspended except for two (2) days to be served at the Intoxicated Driver Resource Center.

It is ORDERED on this 26th day of May, 1987, that the sentence imposed be and hereby is stayed pending the appeal; and

It is further ORDERED that the defendant's request for a jury trial be and hereby is denied.

Dated: May 18, 1987

S/ LINDA R. FEINBERG, J.M.C.

STATE COURTS THAT RECOGNIZE A RIGHT TO TRIAL BY JURY IN CASES INVOLVING PROSECUTION OF DRIVING WHILE INTOXICATED.

1. Alaska- Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970).

2. Arizona- Rothweiler v. Superior Court, 100 Ariz. 37, 410 P. 2d 479 (1966) (en banc).

3. California- Mills v. Municipal Court, 10 Cal. 3d 288, 110 Cal. Rptr. 329, 515 P. 2d 273 (1973).

4. Colorado- City of Canon City v. Merris, 323 P. 2d 614 (Colo. 1958) (charge of driving while intoxicated is a state-wide concern and is not a local matter; therefore, defendant charged as such shall be afforded the same constitutional protections as any criminal defendant).

5. Florida- Carvery v. State, 436 So. 2d. 191 (Fla. App. 2 Dist. 1983) (right to jury trial under Florida statute on the charge of driving while under the influence, section 316. 193 (1) (a); but see State v. Whirley, 421 So. 2d 555 (Fla. App. 2 Dist. 1982) (no right to jury trial under Florida statute on the charge of driving while intoxicated, section 316. 1931).

6. Hawaii- State v. O'Brien, 68 Haw. 39, 704 P. 2d 883 (1985).

7. Idaho- Miller v. Winstead, 270 P. 2d 1010 (Idaho 1954) (right to demand jury trial under state statute on de novo appeal).

8. Louisiana- State v. Sonnier, 461 So. 2d 567 (La. App. 3 Cir. 1984) (constitutional right to jury trial accorded third-time offenders of State drunk driving statute).

9. Maine- State v. Sklar, 317 A. 2d 160 (Me. 1974) (constitutional right to jury trial under state law in all criminal prosecutions, including petty offenses).

10. Maryland- Wilson v. State, 21 Md. App. 557; 321 A. 2d 549 (Md. App. 1974).

11. Minnesota- State v. Hoben, 98 N.W. 2d 813 (Minn. 1959).

12. Mississippi- Scarborough v. State, 261 So. 2d 475 (Miss. 1972).

13. Nebraska- State v. Karel, 284 N.N. 2d 12 (Neb. 1979).

14. Ohio- City of Lima v. Rambo, 113 Ohio App. 158, 17 Ohio Ops. 2d 133, 177 N.E. 2d 554 (Ohio App. 1960).

15. Oklahoma- Evans v. Lambert, 418 P. 2d 217 (Okla. 1966).

16. Oregon- Brown v. Multnomah County District Court, 570 P. 2d 52 (Oregon 1977) (en banc).

17. South Dakota- Parham v. Municipal Court of Sioux Falls, 86 S.D. 531, 199 N.W. 2d 501 (1973).

18. Texas- Turner v. State, 725 S.W. 2d 409 (Tex. Ct. App. 1st Dist. 1987).

19. Vermont- State v. Becker, 287 A. 2d 580 (Vt. 1972) (constitutional right under state law to jury trial in all criminal prosecutions, including petty offenses).

20. Wisconsin- City of Oshkosh v. Lloyd, 255 Wis. 601, 39 N.W. 2d 772 (1949).

21. Wyoming- Lapp v. City of Worland, 612 P. 2d 868 (Wyo. 1980); see also City of Casper v. Cheatham, 739 P. 2d 1223 (Wyo. 1987).

(2)

No. 88-276

IN THE SUPREME COURT OF
UNITED STATES
OCTOBER TERM, 1988

WALTER R. GRIFFIN,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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80pp

QUESTION PRESENTED

Whether this Court should decline discretionary review of the New Jersey Supreme Court's denial of certification to the Superior Court of New Jersey, Appellate Division, which affirmed a lower court's denial of petitioner's request for a trial by jury in his prosecution for second-offender operation of a motor vehicle while under the influence of intoxicating liquor, given that the maximum term of incarceration to which petitioner was exposed was only ninety days?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

Table of Authorities -- Continued

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TO THE SUPREME COURT OF THE STATE
OF NEW JERSEY

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The respondent State of New Jersey respectfully requests that this Court deny the petition for writ of certiorari.

OPINIONS AND JUDGMENTS BELOW

At a bench trial in New Jersey

municipal court, petitioner was convicted of second-offender operation of a motor vehicle while under the influence of intoxicating liquor. (Petitioner's appendix at A-4). Petitioner's request for a jury trial was denied. (Petitioner's appendix at A-4). At a trial de novo before the New Jersey Superior Court, Law Division, petitioner was again convicted and his renewed request for a jury trial denied. (Petitioner's appendix at A-3). The New Jersey Superior Court, Appellate Division, ruled on the merits that petitioner was not entitled to a jury trial and thus affirmed petitioner's conviction on April 8, 1988. (Petitioner's appendix at A-2). The New Jersey Supreme Court denied his petition for certification on June 7, 1988. (Petitioner's appendix at A-1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition for a writ of certiorari has set forth the pertinent text of the New Jersey Statutes which are implicated in this case.

The text of the pertinent provisions of the United States Constitution is as follows:

> Art. III, Section 2, paragraph 3: "The trial of all Crimes, except in cases of Impeachment, shall be by jury; . . . "
>
> Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . "

REASONS WHY THE PETITION SHOULD BE DENIED

A. Petitioner Was Not Entitled to a Jury Trial in his Second-Offender Drunk Driving Prosecution, Given that the Maximum Term of Incarceration to Which Petitioner Was Exposed Was Only Ninety Days

A basic principle of law deeply rooted in the historical practice of the Colonies and the original states declares that, under the Constitution, no person is entitled to a trial by jury for a "petty" offense. Baldwin v. New York, 399 U.S. 66 (1970). This Court has developed, through a series of decisions emanating from Duncan v. Louisiana, 391 U.S. 145 (1968), a bright-line definition of "petty offense": an offense which is subject to a maximum term of incarceration of six months or less. Baldwin, supra; Frank v. United States, 395 U.S. 147 (1969); Codispoti v. Pennsylvania, 418 U.S. 506 (1974).

This Court recently dismissed for want of a substantial federal question an appeal involving an issue similar to that put forth by petitioner herein: whether prosecution for second-offender driving while intoxicated requires a trial by jury as that offense is defined in Louisiana. Bairnsfather v. Louisiana, ___ U.S. ___, 107 S.Ct. 1620 (1987), reh'g denied ___ U.S. ___, 107 S.Ct. 2204 (1987). Bairnsfather requested a jury trial in his prosecution for second-offender drunk driving, an offense mandating a thirty day to six month jail sentence and a $300 to $500 fine, in the Louisiana courts. Bairnsfather presented essentially the same arguments as petitioner in support of his contention that he was entitled to a jury trial. The thrust of those arguments was that certain collateral consequences attendant to a drunk driving

conviction elevate its status from "petty" to that of a "serious" offense requiring a jury trial under the Constitution. Landry v. Hoepfner, 840 F.2d 1201, 1210-1211 (5th Cir. 1988) (en banc).

"[B]y dismissing the appeal for want of a substantial federal question, the Supreme Court in Bairnsfather did reach and so resolve the substantive merits of the appeal . . . . Bairnsfather is thus a ruling on the merits with precedential value, albeit with less such value than an opinion of the Court after full briefing and argument." Landry v. Hoepfner, 840 F.2d at 1212. Petitioner, as a second-offender drunk driver in New Jersey, was subject to a custodial term of far lesser duration than the defendant in Bairnsfather, i.e., between two and ninety days, service of which could be

performed at an Intoxicated Driver's Resource Center. N.J. Stat. Ann. sec. 39:4-50(a)(2).[1] Yet petitioner has advanced no new arguments or legal authorities since the Bairnsfather appeal to warrant this Court's intervention in his case.

Petitioner's reference to this Court's June 20, 1988 grant of certiorari in Blanton v. North Las Vegas, Nevada, Docket No. 87-1437, involving a drunk driving jury trial issue, is not supportive of his cause. This Court's consideration of Blanton was precipitated by a split between federal and state judicial opinions in the same region on the issue. Compare United States v.

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[1] Petitioner admits that his actual sentence in this respect was a suspended term of ninety days, except for two days which were to be served at the Intoxicated Driver's Resource Center. (Petition at 9).

Craner, 652 F.2d 23 (9th Cir. 1981) and Bronson v. Swinney, 648 F. Supp. 1094 (D. Nev. 1986) with Blanton v. North Las Vegas Municipal Court, 103 Nev. 135, 748 P.2d 494 (1987), cert. granted ___ U.S. ___, 108 S.Ct. 2843 (1988). Judicial friction of this nature is expressly recognized as a reason for the grant of review on certiorari. Rule 17.1(b) of the Rules of the United States Supreme Court. In contrast, here, as in Bairnsfather, there is no conflict between the state and federal judiciary emanating from the jury trial issue in petitioner's New Jersey prosecution. Neither the federal district courts of this State nor the Third Circuit is in conflict with the state courts. Consequently, this Court should decline to review petitioner's case.

In Landry, the Fifth Circuit, en banc, reversed a decision of one of its

panels, Landry v. Hoepfner, 818 F.2d 1169 (5th Cir. 1987) and held that the United States Constitution does not require the states to provide the right of trial by jury for a first offense DWI. Noting that the maximum penalty prescribed was six months' imprisonment and a five hundred dollar fine, the Fifth Circuit found that this "does not exceed that appropriate for 'petty' offenses under Baldwin v. New York . . . ." Landry, 840 F.2d at 1202.

Most importantly, the Fifth Circuit declared that this Court

> has never held or stated any crime is a "serious" rather than a "petty" offense on the basis of any criteria other than whether its maximum authorized confinement exceeded six months or whether it was indictable at common law. Otherwise put, the Court has never identified any particular offense as being nonpetty which was both not indictable at common law and carried a maximum authorized confinement of not more than six months." [Id. at 1209 (emphasis in original)].

Petitioner's contention that potential custodial punishment which is well under six months in jail, combined with various collateral consequences such as driver license revocation and increased insurance premiums, elevates drunk driving from an otherwise "petty" offense into a "serious" offense allowing a right to a jury trial, fails to present an important question of federal law as the law in this area has been settled by this Court's earlier opinions.

Further support for respondent's position that this Court should refuse to grant review of petitioner's case can be found in Frank, 395 U.S. at 148:

> In determining whether a particular offense can be classified as "petty", this Court has sought objective indications of the seriousness with which society regards the offense. . . . The most relevant indication . . . is the severity of the penalty authorized for its commission.

This Court also noted in Baldwin that "we have sought objective criteria . . . and we have found the most relevant such criteria in the severity of the maximum authorized penalty." Baldwin, 399 U.S. at 68. Petitioner seeks to establish a new order whereby courts apply subjective criteria, such as collateral consequences of a conviction, to determine the seriousness of an offense on an ad hoc basis. This analysis would produce judicial opinions driven by the personal predilections of the jurist authoring such an opinion. This Court's precedent counsels against such an approach.

In Landry, the Fifth Circuit emphasized that this Court has refined the determination of when an offense is "petty" or "serious," and therefore when a Constitutional right to a jury trial attaches: "Since Baldwin, the Court has spoken only in terms of the length of

possible confinement as establishing the dividing line between 'petty' and serious offenses." Landry, 840 F.2d at 1208. Petitioner's reliance on collateral consequences is misplaced and runs contrary to a long line of decisions by this Court holding that the determinative factor is the maximum authorized period of confinement. Id. at 1215-1216. Again, in Landry, the Fifth Circuit declared the following with reference to dismissal by this Court of the Bairnsfather appeal for want of a substantial federal question: "Clearly there is nothing in Bairnsfather which is in tension with or breaks new ground respecting Duncan, Frank, Baldwin, or Codispoti." Landry, 840 F.2d at 1212.

The New Jersey courts' treatment of the issue raised by petitioner's case strictly follows the principles delineated in the decisions of this

Court. See, e.g., State v. Owens, 54 N.J. 153, 254 A.2d 97 (1969), cert. denied 396 U.S. 1021 (1970); State v. Linnehan, 197 N.J. Super. 41, 484 A.2d 34 (App. Div. 1984), certif. den. 99 N.J. 236, 491 A.2d 723 (1985); State v. Zoppi, 196 N.J. Super. 596, 483 A.2d 844 (Law Div. 1984). Application of this Court's bright-line rule of six months' incarceration demonstrates the propriety of the decisions of the courts below and compels denial of the petition for a writ of certiorari.

B. Petitioner Should Be Seeking a Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division, Rather than to the Supreme Court of the State of New Jersey

Petitioner has filed a petition for a writ of certiorari to the Supreme Court of the State of New Jersey. However, that court has entered no judgment which

may be reversed. The Supreme Court of New Jersey has never ruled on the merits of petitioner's claim. Rather, it has only denied petitioner's petition for a writ of certification to the Superior Court of New Jersey, Appellate Division.

The Superior Court of New Jersey, Appellate Division, is the highest court of the State of New Jersey which has actually ruled on the merits of petitioner's claim. It is apparent that petitioner should be seeking a petition for a writ of certiorari to the Superior Court of New Jersey, Appellate Division, rather than to the Supreme Court of the State of New Jersey. Thus, the petition which petitioner has filed in this Court is incapable of providing him with the relief which he seeks. See, e.g., Faretta v. California, 422 U.S. 806, 812 (1975); Callender v. Florida, 383 U.S. 270 (1966).

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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DATED: October 19, 1988